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9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**
13

14 GT NEXUS, INC.,
15 a Delaware corporation,

16 Plaintiff,

17 v.

18 INTTRA INC.,
a Delaware corporation,

19 Defendant.

20 AND RELATED CROSS-ACTION.
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Case No. 4:11-cv-02145-SBA

**GT NEXUS, INC.'S OPPOSITION TO
INTTRA, INC.'S MOTION TO LIFT
STAY AND REOPEN ACTION**

Date: March 3, 2015

Time: 1:00 p.m.

Place: Courtroom 1

Judge: Hon. Sandra Brown Armstrong

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1 This motion represents INTTRA's second attempt to have the stay lifted in this litigation
2 *before* proceedings in the Patent Office are complete. This motion should be rejected for the
3 same reasons—and for additional reasons relating to progress before the PTAB—as INTTRA's
4 previous motion. In sum, the PTAB instituted CBM review of all claims of all patents-in-suit
5 after which INTTRA filed a motion to dismiss. INTTRA's motion was granted, and the PTAB's
6 work ceased before it could be completed. GT Nexus appealed the grant of the motion to
7 dismiss. INTTRA presents a single basis for requesting the stay be lifted: INTTRA believes GT
8 Nexus's appeal of the termination decision is improper. INTTRA can, and presumably will,
9 raise this objection before the Federal Circuit.

10 GT Nexus's appeal, however, in no way alters the grounds for maintaining the stay
11 discussed by the Court in its previous order on this same issue. INTTRA does not address the
12 stay factors, each one of which favors maintaining the stay. Maintaining the stay will likely
13 further simplify the issues in this litigation. Next, this case remains at an early stage. Further,
14 INTTRA does not argue that it will suffer undue prejudice as a result of maintaining the stay, nor
15 can it for the reasons discussed below, including that it is INTTRA's procedural jockeying that
16 delayed a decision on the merits in the PTAB. In addition, maintaining the stay will likely
17 further preserve Court and party resources. The PTAB has now invested significant resources
18 analyzing the patents-in-suit, and any duplication of efforts should be avoided.

19 Finally, the PTAB found that all claims of all patents-in-suit are more likely than not
20 invalid for failing to claim patent-eligible subject matter under 35 U.S.C. § 101 and the Supreme
21 Court's decision in *Alice Corp. Pty. Ltd v. CLS Bank Int'l. Alice Corp. Pty. Ltd. v. CLS Bank*
22 *Int'l.*, 573 U.S. ___, 134 S. Ct. 2347, 2354 (2014). Should the Court lift the stay, GT Nexus
23 intends to file a dispositive motion on these grounds seeking an order completing the PTAB's
24 work. GT Nexus respectfully requests that, should the stay be lifted, it be lifted only for the
25 purposes of deciding such case dispositive motion, as anything further would be an egregious
26 waste of Court and party resources.

1 **I. FACTUAL BACKGROUND**

2 **A. Procedural History**

3 Between July and November of 2010, the PTO issued four patents to INTTRA, all of
4 which are asserted in this lawsuit. INTTRA waited almost a year after the first of the patents-in-
5 suit issued before it threatened GT Nexus with its patents as part of ongoing business
6 discussions. Dkt. No. 1, ¶¶ 13-14. Because of INTTRA's threats, GT Nexus filed a complaint
7 on May 2, 2011, seeking a declaratory judgment that the patents are invalid and not infringed.
8 Dkt. No. 1. After filing two requests for extensions of time, INTTRA answered the complaint
9 and filed counterclaims for infringement against GT Nexus and seven of its customers. Dkt.
10 Nos. 11, 18, 20. At no point has INTTRA sought preliminary injunctive relief or indicated any
11 intent to do so. Because INTTRA had problems serving all of the defendants named in its
12 counterclaims, the initial case management conference was repeatedly continued and was
13 ultimately set for February 23, 2012. Dkt. Nos. 26, 44, 52.

14 Before the Court held the initial case management conference, GT Nexus filed requests
15 with the PTO for *ex parte* reexamination of all four patents-in-suit, asserting invalidity for lack
16 of novelty and for obviousness (under 35 U.S.C. §§ 102, 103). An *ex parte* reexamination
17 considers a patent's validity on the basis of patents or printed publications. Brewer Decl. at ¶ 2.
18 The party submitting the *ex parte* reexamination request has no further involvement in the
19 proceeding at the PTO after the request is submitted. *Id.* Shortly after the filing of the *ex parte*
20 reexamination requests, GT Nexus and INTTRA stipulated to stay the case, including any
21 appeals from the *ex parte* reexaminations. Dkt. No. 58. The Court entered an order staying and
22 administratively closing this case on February 21, 2012. Dkt. No. 61. The last of the patents-in-
23 suit emerged from reexamination on November 26, 2013. INTTRA filed a motion to lift the stay
24 on February 4, 2014. Dkt. No. 65. On February 18, 2014, GT Nexus filed petitions for CBM
25 review on the patents-in-suit and opposed lifting the stay. Dkt. No. 66, Exs. B-E. On July 9,
26 2014, the Court issued an order denying INTTRA's motion to lift the stay and maintaining the
27 administrative close of the case. Order, Dkt. No. 71. In the Order, the Court recognized that the
28 procedures for *ex parte* reexamination and CBM review are different. *See id.* at 9.

1 The litigation is at an early stage: the parties have not exchanged infringement or
 2 invalidity contentions, and no discovery has been taken or requested. *See* Brewer Decl. at ¶ 3;
 3 *see also* Dkt. No. 58 (stipulation to stay the case in which the parties agreed “this case is in the
 4 early stages”). The only motion filed in this action is Counter-Defendant Bacardi-Martini
 5 Production’s motion to dismiss for lack of personal jurisdiction, which is not fully briefed. Dkt.
 6 Nos. 53, 55, 60.

7 **B. Patents-in-suit**

8 The patents-in-suit generally relate to “[a]n on-line system and method for buyers and
 9 sellers of international container transportation services,” and cover computer-implemented
 10 methods for coordinating containerized shipping. Dkt. No. 1, Exs. A-D. The background
 11 section describes the prior art method of booking and tracking shipping containers. Specifically,
 12 a shipper contracts directly with multiple carriers to set shipping rates. Dkt. No. 1, Ex. A, ’142
 13 patent at 1:15-18. Once the shipper has a container to ship, the shipper serially contacts carriers
 14 with whom it has contracted to check availability and determine which carrier to use to transport
 15 the goods. *Id.* at 1:24-36. A shipper will sometimes use a freight forwarder to coordinate the
 16 transportation of goods with the various carriers on behalf of the shipper, performing the task of
 17 serially contacting carriers. *Id.* at 1:49-59. Carriers will provide shippers with tracking and
 18 tracing information. In fact, “[i]t is not uncommon for carriers to devote an entire workgroup to
 19 handling phone calls from shippers requiring information on the location of their goods.” *Id.* at
 20 2:24-26. The claims of the patents-in-suit are directed to the automation of this process through
 21 a neutral portal.

22 **C. CBM Review**

23 Section 18 of the AIA created a new transitional program authorizing persons or entities
 24 alleged of infringing a CBM patent to petition the PTAB for review of the validity of the patent.
 25 AIA § 18(a)(1). Although the AIA was signed into law on September 16, 2011, the CBM review
 26 component was not implemented until September 16, 2012. *Progressive Cas Ins. Co. v. Safeco*
 27 *Ins. Co. of Ill.*, Case Nos. 1:10-cv-01370, 1:11-cv-00082, 1:12-cv-01068, 1:12-cv-01070, 2013
 28 WL 1662952, at *2 (N.D. Ohio 2014). CBM review allows a petitioner to challenge the validity

1 of software and business method patent claims “on any ground that could be raised under
 2 paragraph (2) or (3) of section 282(b),” *i.e.*, 35 U.S.C. §§ 101, 102, 103, or 112. *See* AIA §§ 18
 3 and 32. The petitioner participates as a party in the CBM review. *See* AIA § 18(a)(1); 35 U.S.C.
 4 §326. A petitioner is estopped from raising any grounds of invalidity for which the PTAB
 5 renders a final decision in a district court case. *See* AIA § 18(a)(1)(D).

6 In enacting this procedure, Congress stated that CBM review was provided to “allow
 7 companies that are the target of one of these frivolous business method patent lawsuits to go
 8 back to the PTO and demonstrate, with the appropriate prior art, that the patent shouldn’t have
 9 been issued in the first place.” 157 Cong. Rec. S1053 (daily ed. Mar. 1, 2011), at S1053
 10 (statement of Sen. Schumer). Congress noted “[t]hat way bad patents can be knocked out in an
 11 efficient administrative proceeding, avoiding costly litigation.” *Id.*

12 **D. Proceedings at the PTAB**

13 The petitions for CBM review, filed on February 18, 2014, challenged the validity each
 14 of the patents-in-suit under 35 U.S.C. §§ 101, 103, and 112, and were supported by detailed
 15 expert declarations. Brewer Decl. at ¶ 4. The petitions and expert declarations cumulatively
 16 totaled 309 and 334 pages, respectively. *Id.* INTTRA filed its preliminary responses to the
 17 petitions on May 27, 2014, cumulatively totaling 230 pages in length. *Id.* at ¶ 5.

18 **1. The PTAB’s institution decisions**

19 On August 12, 2014, the PTAB instituted CBM review for each of the patents-in-suit.
 20 *See* Brewer Decl. at ¶ 6. The PTAB found that every claim of the patents-in-suit is more likely
 21 than not unpatentable on multiple grounds, including because they are directed to patent-
 22 ineligible subject matter and in view of the prior art. *Id.* The PTAB did not institute review
 23 under § 112. *Id.* The PTAB’s basis for instituting review is set forth in detail in the respective
 24 institution decisions for each patent-in-suit. *See* Brewer Decl., Exs. A-D.

25 Specifically, the PTAB found that each of the claims of the patents-in-suit are directed to
 26 an abstract idea. Brewer Decl., Ex. A at 12 (“The claims of the ’794 patent are directed to a
 27 patent-ineligible concept: booking shipping through a third party.”); *id.*, Ex. B at 16 (finding the
 28 claims of the ’387 patent are directed to the abstract idea of “booking a container shipment”);

Ex. C at 18-19 (finding that the claims of the '142 patent are “directed to the abstract idea of using an intermediary to manage container shipping requests and track shipment”); Ex. D at 14 (“The claims [of the '119 patent] are directed to a patent-ineligible concept: tracking an object from point A to point B.”). The PTAB also remarked that each of the patents-in-suit is directed to “a fundamental practice, long prevalent in our system of commerce.” Brewer Decl., Ex. A at 12 (“[B]ooking container shipments is a fundamental practice, long prevalent in our system of commerce.”) (citing to '794 patent at 1:9-2:10); Ex. B at 16 (same as to “the buying and selling of transportation services”) (citing '387 patent at 1:12-2:48); Ex. C at 19 (same as to “the concept of intermediated shipping”) (citing the '142 patent at 1:12-2:53); Ex. D at 14 (same as to “tracking and tracing goods in transit”) (citing the '119 patent at 2:10-22).

The PTAB then analyzed the claims to determine whether they included an “inventive concept,” and finding that they did not. Brewer Decl., Ex. A at 13 (rejecting Patent Owner’s arguments that the claims of the '794 patent recite meaningful limitations, stating: “We would reasonably expect almost any e-commerce system to provide a user interface with templates for data entry by a user. Similarly, we would expect almost any e-commerce system to employ computer storage, servers, and data transmission.”); Ex. B at 17-18 (finding that “the system [of the '387 patent] does no more than perform generic computer functions to automate previously well-known manual tasks.”); Ex. D at 15 (same as to the '119 patent and further commenting that the '119 patent “merely takes the kind of shipment information that was previously tracked manually, stores that information in a generic database, and permits users to retrieve the stored information using generic computer database query techniques.”); Ex. C at 20 (finding that the limitations of the '142 patent are nothing more “than well-understood, routine, conventional activities previously known to the industry.”). The PTAB further remarked “that a person of ordinary skill in the art would understand that storing, searching, matching, retrieving matched data, and then outputting matched data is a generic capability of any digital computer installed with database software.” *Id.*, Ex. B at 18, Fn. 8; Ex. D at 15, Fn. 8. The PTAB, therefore, determined that it was more likely than not that claims of the patents-in-suit be unpatentable under 35 U.S.C. § 101 as being drawn to patent-ineligible subject matter. *Id.*, Ex. A at 13-14; Ex.

1 B at 18; Ex. C at 21-22; Ex. D at 15-16.

2 The PTAB further analyzed each of the prior art grounds presented and determined that
3 the claims are also more likely than not invalid under 35 U.S.C. § 103 in view of the prior art.
4 *Id.*, Ex. A at 21; Ex. B at 26; Ex. C at 29, 31; Ex. D at 22-23.

5 At the same time as the institution decisions, the PTAB issued scheduling orders, setting
6 an oral hearing for April 22, 2015. *Id.* at ¶ 11. The deadline for the PTAB to issue its final
7 written decisions was August 12, 2015. *Id.*

8 **2. The PTAB's termination decision**

9 On October 17, 2014, INTTRA filed a motion to dismiss on the grounds that CBM
10 review was statutorily barred based upon the PTAB's *SecureBuy* decision. Brewer Decl. at ¶ 12;
11 *see also SecureBuy LLC v. CardinalCommerce Corp.*, Case CBM2014-00035, Paper No. 12
12 (April 25, 2014). GT Nexus responded on October 31, 2014, arguing waiver and the propriety of
13 the CBM reviews in view of the statute and the Director's rules governing CBM review. *Id.* at
14 ¶ 13. INTTRA filed a reply on November 11, 2014. *Id.* at ¶ 14. On December 10, 2014, the
15 PTAB issued a decision terminating the CBM reviews. *Id.* at ¶ 15. GT Nexus filed its notices of
16 appeal to the Federal Circuit on January 9, 2015. *Id.*, Ex. E-H. The deadline for the Patent
17 Office to transfer the record to the Federal Circuit is February 18, 2015, at which point the
18 Federal Circuit will docket the appeal. *Id.* at ¶ 17. It is projected that briefing will be completed
19 in June and oral arguments will be scheduled for early fall 2015. *Id.*

20 **II. ARGUMENT**

21 **A. Legal Standard**

22 The AIA was "designed to provide a cheaper, faster alternative to district court litigation"
23 and to "place[] a very heavy thumb on the scale in favor of a stay being granted." *Progressive*,
24 2013 WL 1662952, at *3; *Zillow, Inc. v. Trulia, Inc.*, No. 2:12-cv-01549, 2013 WL 5530573, at
25 *3 (W.D. Wash. Oct. 7, 2013). Congress explained that "it is nearly impossible to imagine a
26 scenario in which a district court would not issue a stay" pending CBM review. 157 Cong. Rec.
27 S1053, at S1053 (statement of Sen. Schumer). Denial of stay would require "an extraordinary
28 and extremely rare set of circumstances not contemplated in any of the existing case law related

1 to stays pending reexamination.” 157 Cong. Rec. S1360, at S1364 (statement of Sen. Schumer).
 2 In fact, the Federal Circuit has reversed district courts under AIA Section 18(b)(2) providing
 3 interlocutory appeal of any denial of a stay motion pending CBM review. *See Versata Software,*
 4 *Inc. v. Callidus Software, Inc.*, Case No. 2014-1468, slip op. at *passim*, (Fed. Cir. 2014)
 5 (reversing denial of stay and finding that all four factors strongly favored a stay) (“Callidus
 6 Software”); *VirtualAgility, Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1320 (Fed. Cir. 2014)
 7 (finding that three of four factors weighed heavily in favor of a stay and fourth factor relating to
 8 undue prejudice weighed slightly in favor of denying a stay where parties were competitors and
 9 patent owner had argued it would lose market share and consumer goodwill, but had failed to
 10 seek a preliminary injunction).

11 Section 18 of the AIA sets forth the four-factor test to be used in deciding a stay motion:

- 12 (1) whether a stay, or the denial thereof, will simplify the issues in question and
streamline the trial;
- 13 (2) whether discovery is complete and whether a trial date has been set;
- 14 (3) whether a stay, or the denial thereof, would unduly prejudice the nonmoving
party or present a clear tactical advantage for the moving party; and
- 15 (4) whether a stay, or the denial thereof, will reduce the burden of litigation on
the parties and on the court.

16 Order at 3 (citing AIA § 18(b)(1), P.L. 112-29, 125 Stat. 284, 331 (2011)). Congress expressly
 17 included the fourth factor in order “to ease the movant’s task of demonstrating the need for a
 18 stay” and “to increase the likelihood that the court will grant a stay when a party initiates a
 19 transitional CBM review, as opposed to an ordinary PTO reexamination.” *Mkt.-Alerts Pty., Ltd*
 20 *v. Bloomberg Fin. L.P.*, 922 F. Supp. 2d 486, 489-90 (D. Del. 2013); *Zillow*, 2013 WL 5530573,
 21 at *3 n.1.

22 “A district court has discretion to lift a stay of litigation.” *Tse v. Apple, Inc.*, Case No.
 23 4:06-cv-06573, 2013 WL 5302587, at 2 (N.D. Cal. Sept. 19, 2013) (Armstrong, J.) (citing
 24 *Canady v. Erbe Elektromedizin GMBH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002)). A lift of the stay
 25 is appropriate if the circumstances supporting the stay have changed. *See id.*; *see also Canady*,
 26 271 F. Supp. 2d at 74 (“When circumstances have changed such that the Court’s reasons for
 27 imposing the stay no longer exists or are inappropriate, the court may lift the stay.”).

B. All Factors Favor Maintaining a Stay, as the CBM Review is not Complete.

There has been no change in circumstances that warrants lifting the stay and, as before, all of the factors support maintaining the stay.

1. A stay will simplify the issues and streamline further litigation.

The PTAB already determined that it is more likely than not that all of the claims of the patents-in-suit are invalid as directed to patent-ineligible subject matter and in view of the prior art, so all claims of the patents-in-suit will be impacted, in some way, by the PTAB's complete review. *See Intertainer, Inc. v. Hulu, LLC*, No. 2:13-cv-5499, Dkt. No. 29 at 3 (C.D. Cal. Jan. 24, 2014). Further, while the Court has already benefitted from the PTAB's expert opinion in the institution decisions, the Court could receive additional benefit should the PTAB be permitted to complete the CBM reviews. *See Zillow*, 2013 WL 5530573 at *4. There is also a significant chance the claims will be found unpatentable in any continued reexamination of the patents-in-suit. For instituted proceedings, PTAB trials resulted in cancellation (whether by PTAB decision or patent owner disclaimer) of 496 out of 507 challenged claims, or 98%. *Brewer Decl.* at ¶ 18.

Moreover, this Court has already found that CBM review will simplify the issues and that this factor weighs in favor of maintaining the stay. *Order* at 5-6. Specifically, this Court found that if the PTAB "finds that one or more of the asserted claims of the patents-in-suit are invalid or subject to modification, the Court will have wasted judicial resources and the parties will have unnecessarily expended funds addressing invalid claims or claims modified during CBM review." *Id.* at 5. The Court further agreed that the case would be streamlined if the PTAB upholds the validity of any of the claims because GT Nexus will be estopped from raising any invalidity arguments raised in the CBM review proceedings. *Id.* at 6. Similarly, INTTRA will be estopped by any concessions or arguments made during the CBM review. *See CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1158 (Fed. Cir. 1997). Finally, the Court found that it would benefit from the PTAB's expert opinion should any of the claims survive CBM review. *Id.* The Court, therefore, concluded that "it is likely that CBM review will at least streamline this case, thereby conserving the resources of the parties and promoting the interests of judicial

economy. Furthermore, the granting of a stay will avoid the possibility of inconsistent results.”
Id. These considerations remain, and this factor strongly favors maintaining the stay in view of
 the extensive work already done by the PTAB to determine that all claims of the patents-in-suit
 are more likely than not invalid.

2. The lawsuit is at an early stage, which weighs in favor of a stay.

The present case remains at a very early stage, a factor which strongly weighs in favor of
 maintaining the stay, as the parties have not exchanged infringement or invalidity contentions,
 and no discovery has been taken or requested. *See Mkt.-Alerts*, 922 F. Supp. 2d at 494. In
 denying INTTRA’s previous motion to lift the stay, the Court analyzed the stage of the case at
 the time of the parties’ stipulation to stay the case and concluded that “because the instant action
 was stayed at an early stage in the litigation, the Court finds that the second AIA factor weighs in
 favor of maintaining the stay.” Order at 6. This factor remains unchanged and, accordingly,
 favors maintaining the stay.

3. A stay will not unduly prejudice INTTRA or provide GT Nexus with any tactical advantage in the litigation.

The “salient question posed by the third factor” is not whether INTTRA will be
 prejudiced, but whether INTTRA will be “unduly prejudiced.” *Progressive*, 2013 WL 1662952
 at *6-7 (granting a second stay pending CBM review after granting a first stay pending *ex parte*
 reexamination). “It should be noted that ‘delay inherent in the reexamination process does not
 constitute, by itself, undue prejudice.’” *AT&T Intellectual Property I v. Tivo, Inc.*, 774 F. Supp.
 2d 1049, 1054 (N.D. Cal. 2011) (Armstrong, J.).

As a threshold matter, INTTRA did not argue it would be prejudiced, much less unduly
 prejudiced, if the Court maintains the stay. Further, INTTRA’s actions in this case belie any
 undue prejudice. INTTRA waited almost a year after issuance of the first patent before
 threatening GT Nexus with its patents during business discussions. Dkt. No. 1, ¶¶ 13-14. In
 addition, GT Nexus filed this lawsuit, not INTTRA. Dkt. No. 1. INTTRA then sought two
 extensions before responding to the complaint and stipulated to the initial stay, including any
 appeals. Dkt. Nos. 11, 18, 58. Further, the latest delay of a decision on the merits is entirely of

1 INTTRA's own making. INTTRA opted to bring an untimely motion to dismiss rather than
 2 address the CBM reviews on the merits. Whereas the final written decision for the CBM reviews
 3 from the PTAB was supposed to have issued by August 12, 2015, oral arguments for the appeal
 4 will likely not be heard until at least September with an order issuing a few months later. Brewer
 5 Decl. at ¶¶ 11, 17. INTTRA cannot now claim undue prejudice as a result of its own delay.

6 In analyzing INTTRA's previous effort to lift the stay, this Court found that INTTRA had
 7 not demonstrated that additional delay from a stay pending CBM review would cause it to suffer
 8 under prejudice. Order at 8. In fact, the Court recognized that INTTRA did not specifically
 9 argue that it would suffer undue prejudice from further delay in its previous motion, nor did
 10 INTTRA show that monetary damages would be inadequate to remedy any prejudice occasioned
 11 by delay. *Id.* Accordingly, as before, this factor favors maintaining the stay.

12 **4. A stay will “reduce the burden of litigation on the parties and on the**
 13 **court.”**

14 The CBM reviews address all of the claims in the patents-in-suit, and review was
 15 instituted under both § 101 and § 103. Brewer Decl., Ex. A-D. Through its institution decisions,
 16 the PTAB has already provided guidance for the Court relating to the patents-in-suit should the
 17 litigation proceed, but the better result would be for the PTAB to be permitted to complete its
 18 review. Maintaining the stay pending the appeal and any subsequent PTAB proceeding ensures
 19 this Court will not unnecessarily “expend substantial judicial resources in deciding claim
 20 construction, non-infringement, and invalidity issues before those claims are invalidated,
 21 narrowed, or refined through CMB [sic] review.” *Progressive*, 2013 WL 1662952 at *8; *Zillow*,
 22 2013 WL 5530573 at *8. In its previous Order, this Court found that “a stay will reduce the
 23 burden of litigation on the parties and the Court because it will avoid parallel proceedings
 24 concerning the validity of the patents-in-suit.” Order at 9. This remains true in view of the
 25 PTAB's institution of the CBM reviews and the current appeal. Accordingly, this factor also
 26 favors maintaining the stay.

C. INTTRA’s Argument for Lifting the Stay Must be Rejected, as GT Nexus Properly Appealed the PTAB’s Termination Decision to the Federal Circuit.

INTTRA’s sole argument is based upon the illogical conclusion that the PTAB’s termination decision qualifies as an institution decision because there was no final written decision and it vacated the institution decisions. Motion at 3. Based on this false premise, INTTRA then relies upon cases in which the Federal Circuit has analyzed whether it has jurisdiction to review institution decisions. Motion at 3-4. These cases are inapplicable as GT Nexus appeals the termination of the CBM proceedings, not the institution. Put simply, there are two parts of each CBM review: “institution” and “conduct.” *See, e.g., St. Jude Med., Cardiology Div. v. Volcano Corp.*, 749 F.3d 1373, 1374 (Fed. Cir. 2014). Appeals to the Federal Circuit are not available for “institution.” *Id.* Here, the CBM reviews were instituted and in the “conduct” portion of the proceedings, and appeal is appropriate.

Further, INTTRA’s argument only relates to one of several grounds for appeal raised by GT Nexus. Should the Federal Circuit determine it does not have jurisdiction under 35 U.S.C. § 141(c) as INTTRA argues, GT Nexus also appealed under 28 U.S.C. § 1295(a)(4)(A), 28 U.S.C. § 1651, and/or 5 U.S.C. §§ 702 and 704. Section 1295(a)(4)(A) provides the Federal Circuit has jurisdiction “of an appeal from a decision of the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to a patent application, derivation proceeding, reexamination, post-grant review, or inter partes review under title 35, at the instance of a party who exercised that party’s right to participate in the applicable proceeding before or appeal to the Board” and provides a clear right to appeal the termination decision, which qualifies as a decision of the PTAB. Section 1651 relates to writs or mandamus, which the Federal Circuit has recently indicated appropriate for certain institution decisions. *See In re Cuozzo Speed Techs., LLC*, Appeal No. 2014-1301, slip op. at 9 (Fed. Cir. Feb. 4, 2015). Sections 702 and 704 permit review of agency actions, including judicial review for a legal wrong resulting from an agency action and a “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.” 5 U.S.C. §§ 702 and 704.

In short, INTTRA’s objections are unfounded and GT Nexus is not barred from appealing

1 the PTAB's decision terminating the CBM reviews. INTTRA can, and presumably will, raise its
 2 objections before the Federal Circuit. Such objections form no basis for lifting the stay in this
 3 litigation, and INTTRA's motion should be denied.

4 **D. The INTTRA Patents Claim Ineligible Subject Matter Under 35 U.S.C.**
 5 **§ 101.**

6 Abstract ideas are patent-ineligible. *See, e.g., Alice*, 134 S. Ct. at 2354; *Bilski v. Kappos*,
 7 130 S. Ct. 3218, 3231 (2010); *Bancorp Servs. L.L.C. v. Sun Life Assurance Co. of Canada*, 687
 8 F.3d 1266, 1281 (Fed. Cir. 2012). The PTAB already concluded that each of the patents-in-suit
 9 is directed to an abstract idea. *See* Brewer Decl., Ex. A at 12 (finding '794 patent is directed to
 10 abstract idea of "booking shipping through a third party"); Ex. B at 16 (finding '387 patent is
 11 directed to abstract idea of "booking a container shipment"); Ex. C at 18-19 (finding '142 patent
 12 is directed to abstract idea of "using an intermediary to manage container shipping requests and
 13 track shipment"); Ex. D at 14 (finding '119 patent is directed to abstract idea of "tracking an
 14 object from point A to point B"). The PTAB went on to determine that the claims do not include
 15 an inventive step and do nothing more than automate existing practices, including the role of the
 16 freight forwarder and the provision of tracking and tracing information. *See, e.g., id.*, Ex. D at
 17 15 ("The system does no more than perform generic computer functions to automate previously
 18 well-known manual tasks. In other words, it merely takes the kind of shipment information that
 19 was previously tracked manually, stores that information in a generic database, and permits users
 20 to retrieve the stored information using generic computer database query techniques.") (internal
 21 citations omitted).

22 Should the Court elect to lift the stay, the stay should be lifted only for the purposes of a
 23 dispositive motion of invalidity on the grounds that the patents-in-suit are invalid as directed to
 24 patent-ineligible subject matter. In other words, should the stay be lifted, GT Nexus respectfully
 25 requests this Court complete the work started by the PTAB, and GT Nexus maintains that any
 26 other litigation activity pending this determination would be a waste of Court and party
 27 resources.
 28

1 **III. CONCLUSION**

2 For these reasons, GT Nexus respectfully requests that the Court deny INTTRA's motion
3 to lift the stay in these proceedings.

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5 Dated: February 10, 2015

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7
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